No. 87-514

In the Supreme Court of the United States

OCTOBER TERM, 1987

Supreme Court, U.S.
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JAMES L. HOOPER AND
DEER PARK MEDICAL GROUP, P.A.,

Petitioners,

v.

STEPHEN H. SACHS, DALE P. KELBERMAN,
AND ANDREW C. TARTAGLINO,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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ARGUMENT

1. Respondents' Brief in Opposition contains a number of legally correct statements having no applicability to the case at bar. It demonstrates the existing confusion concerning the application of Rule

56. The isolated legalisms Respondents advance are precisely the problem with the court of appeals opinion -- considering evidence and elements of a cause of action in isolation from one another, rather than as an integrated whole.

2. Unquestionably, in opposing a motion for summary judgment a plaintiff must produce some evidence which would warrant a jury verdict in his favor. However, according to Respondents and the court of appeals, a plaintiff must produce direct evidence. Some evidence does not mean direct evidence. The burden can be sustained by producing circumstantial evidence, especially when, as here, that circumstantial evidence was buttressed by demonstrably false statements made by Respondents and Winchell in their

testimonies on other relevant matters.1/ Thus, Respondents' contentions that we argue simply that the jury might disbelieve their testimony, and that every case where state of mind is at issue must go to trial, is inaccurate and incorrect. Respondents merely attempt to obfuscate and confuse the issues.

3. By requiring "direct evidence" (A. 6) of MFCU encourgement of Winchell in her searches and seizures on March 10 and 12, 1980, the court of appeals, in essence, was mandating "smoking gun" evidence.2/ While this is not an employment discrimination

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1/ We note that our summaries of Respondents' and Winchell's testimonies have not been disputed. Nor is there any dispute that discovery from Respondents was delayed for more than three years and was finally had when the district court lifted the stay obtained by Respondents. When files that at all times were in the custody and control of Respondents finally were produced, documents relating to a period critical to this case were "missing" -- "lost" by Repondents.

2/ Implicit in the court of appeals statement that there was no direct evidence is that there was indirect or cirumstantial evidence.

case, "smoking gun" evidence is no less easy to acquire in a case of this type.3/ The standards applicable to what is required to defeat a defendant's motion for summary judgment necessarily are similar. Accordingly, what the Third Circuit said in Chipollini v. Spencer Gifts, Inc., 814 F.2d 893, (en banc) (1987) (petition for certiorari dismissed pursuant to Rule 53 of the Rules of this Court, September 9, 1987, No. 86-2007), is apt. In the absence of a "smoking gun" (possibly contained in the "lost" documents), plaintiffs necessarily were required to rely on circumstantial evidence.

In the context of the summary judgment motion,

3/ Employment discrimination cases typically present fact questions where direct evidence is difficult or impossible to obtain; however, other cases contain fact issues with similar problems of proof. There is no reason to treat such an issue of proof differently when it arises in other than a discrimination context. It is the nature of the factual issue, not the type of case, which should be determinative.

> however, the court should have considered whether evidence of inconsistencies and implausibilities ... could support an inference [favorable to the plaintiff], not whether the evidence necessarily leads to that conclusion...
>
> The district court erred in weighing competing inferences and in resolving disputed facts.[4/]
> 11

Id. at 900 (emphasis in original).

Furthermore,

> we do not require direct proof of age discrimination because it is often unavailable or difficult to find. Dillon v. Coles, 746 F.2d at 1003. As the Supreme Court explained, "[t]here will seldom be 'eyewitness' testimony as to the employer's mental processes." Aikens, 460 U.S. at 716, 103 S. Ct. at 1482. *** In addition, "even an employer who knowingly discriminates on the basis of age may leave no written records revealing the forbidden motive and may communicate it orally to no one." Id.

Id. at 899.

4/ As stated in our Petition at 15 and 30, the district court improperly weighed "competing inferences and resolv[ed] disputed facts." See, A. 114-117.

4. In the case at bar, relevant written records under defendants' control were "missing" -- "lost." The only material communications were between and among the defendants in this action, and defendants were told by the district court, prior to meaningful discovery, precisely how to testify to obtain a summary judgment.

5. Both Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), and Celotex Corp. v. Catrett, 477 U.S. 317 (1986), were decided by a divided Court. That notwithstanding, none of the opinions in either case supports a conclusion that summary for defendants was proper in this case.

Respondents quote the majority opinion in Celotex for the proposition that a plaintiff has the burden of producing some evidence on each element of his case (Br. at 5). They argue from the quoted language that plaintiffs were required to produce direct evidence that the MFCU encouraged Winchell's

March, 1980, searches and seizures. Respondents misinterpret Celotex to mean that the production of evidence requires direct evidence. Nothing in Celotex supports that position. Indeed, in Adickes v. S.H. Kress Co., 398 U.S. 144 (1970) (cited with approval by the Court in both Anderson and Celotex), the Court reversed a summary judgment for defendant on the ground that there was circumstantial evidence from which a jury might infer a conspiracy. 398 U.S. at 158-159; Anderson, supra, 106 S. Ct. at 2510-2511.

Similarly, Respondents quote Anderson (Br. at 8) for the proposition that discredited testimony normally is not a sufficient basis for drawing a contrary conclusion and that the plaintiff must present some affirmative evidence of facts he wishes to prove. Again, Respondents interpret some evidence to mean direct evidence. As stated above, in this case

there was circumstantial evidence,5/ buttressed by Respondents' demonstrably incredible testimonies on other material matters. Furthermore, the testimony of Anton Keeting (see, Pet. at 13-14) established that in some instances the MFCU asked private individuals to obtain evidence. He stated he was not sure whether such a request was made of Winchell.

6. The right of access to the courts is substantially unlimited. Rule 56 was not intended as a vehicle to foreclose litigants from their "day in court." The courts below, and Respondents, would achieve that result by imposing a virtually impossible burden in cases such as this by requiring direct evidence of facts peculiarly within defendants' knowledge and holding that circumstantial evidence, even when combined with demonstrably incredible testimony, is not enough to get to trial. The time for

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5/ See, p. 3 n. 2, supra.

this Court to clarify Anderson and Celotex is now, not after numerous civil plaintiffs have been denied the trial by jury to which they constitutionally are entitled.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the Petition, a writ of certiorari should be granted.

Respectfully submitted,

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